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The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

January 18, 1991

George L. Schroeder, Director
Legislative Audit Council
400 Gervais Street
Columbia, South Carolina 29201

Dear Mr. Schroeder:

With reference to an opinion of our Office dated June 24, 1981 and more recent legislative changes, you have asked that we review the prior opinion and advise as to whether it still represents the opinion of our Office. You have raised a number of other questions which must be analyzed in light of that opinion, subsequent legislation, and opinions of this Office dated September 21 and 26, 1990. The opinion of June 24, 1981 remains the opinion of this Office except as modified by this opinion and those issued on September 21 and 26, 1990.

I. With respect to a file compiled by the Legislative Audit Council in conducting a sunset review, after the audit report has been issued, you have asked whether a legislator could be permitted to view a file and make notes therefrom; you have also inquired about making available copies of documents from that file.

In the opinions dated September 21 and 26, 1990, this Office concluded that records of the Legislative Audit Council relative to sunset reviews of various boards or agencies would be available for disclosure once the final review and evaluation report of a particular agency or board is published. Such availability would be limited only by the consideration of whether given information is accorded confidential status by some specific provision of law. See S.C. Code Ann. § 2-15-120 (1986). Thus, the records in question would not be generally confidential, as a matter of law, once the final report is released, except as to particular matters protected by statute.

Once the final report is released, it would be appropriate to treat these records as any other records would be treated under the Freedom of Information Act, § 30-4-10 et seq. At a minimum, a legislator would have the right to inspect the records and make notes therefrom; or he might request copies of particular documents. See Op. Atty. Gen. dated May 14, 1987; § 30-4-30(a)(1)

("[a]ny person has a right to inspect or copy any public record of a public body...."). Thus, once the final report is released, we see no distinction in permitting a legislator to view a file and make notes as opposed to his being provided copies of documents from the files, assuming that the documents are not accorded confidential status by some provision of law.

II. With respect to access to Audit Council records, you asked whether any distinction should be made in the way in which the Audit Council would respond to: a legislative committee which is reviewing the operation of the Audit Council; an individual legislator who is not connected with Audit Council review; a legislator who requested the audit; and legislative staff.

The various statutes applicable to the Audit Council and other relevant statutes such as the Freedom of Information Act do not specifically address these questions. The answers may well depend on the facts and circumstances of each individual circumstance. Legislators do not ordinarily have access to confidential documents (such as income tax records, for example) by virtue of their status as legislators; no statute of which we are aware confers such a superior right to access of confidential information. On the other hand, a legislator in a given situation may well have a justified need to know certain information; the argument for disclosure in such cases is strengthened by the fact that the Audit Council is an arm of the legislative branch of government, deriving its powers and duties from the legislature. Cf., Op. Atty. Gen. dated May 3, 1978. Thus, it is impossible to generally respond to this question except to suggest that each situation be evaluated on its own merits before permitting or denying disclosure of information in the files of the Audit Council.

In the opinion of June 24, 1981, this Office previously advised:

> It is the opinion of this Office that it would not be a public disclosure as prohibited by §2-15-120 to provide a confidential viewing and/or explanation to those legislators requesting same or those agency-under-audit personnel of draft reports, preliminary audit reports, or study reports, provided that those to whom such a viewing or explanation is given understand that they are subject to §2-15-120 and could be liable for any subsequent public disclosure of the information seen or heard. It is the opinion of this Office that it would not be a violation of §2-15-120 for your Commission or Council, respectively, to perform properly those duties for which each was established by the legislature.

The opinion also stated:

> Disclosure by the Legislative Audit Council of information requested by an individual legislator or committee can be made in confidence to that individual or committee making the request. The issue of subsequent public disclosure by that legislator or members of that committee does not directly affect the Legislative Audit Council but the individual or committee receiving the information should be made aware that the possibility of a violation of §2-15-120 exists if that individual or committee publicly discloses the contents of any record of the Legislative Audit Council.

These statements still represent the opinion of this Office.

III. You have asked whether it would be appropriate to request a member of the General Assembly to sign an affidavit of confidentiality. If appropriate at all, under what circumstances should the affidavit be used?

Again, this is a matter not addressed by the relevant statutes. Rather than a matter of law, this would be a matter of policy to be decided by the Audit Council, such policy to be promulgated in keeping with the purpose of statutes such as § 2-15-120. If the affidavit would be used to enforce the confidentiality statutes, then the affidavits could be used whenever the Audit Council felt such use was necessary. If member of the General Assembly should have a special interest in or be a participant in a particular audit, that member would, of course, be subject to the same confidentiality statutes governing the staff of the Audit Council and others whether or not an affidavit is executed; see §§ 2-15-62 and 2-15-120 in particular.

In the opinion of June 24, 1981, this Office stated:

> We would strongly suggest that those persons outside of your immediate staffs, who are given access to any of the above information, be requested to sign a form essentially like that included with this letter as Attachment A. This would be done both in aid of establishing your position that no public disclosure occurred during the course of your agencies' normal activities and to alert all concerned to the possibility of criminal liability for any subsequent disclosure by them.

Whether an individual should be requested or required to sign such an affidavit remains a matter of policy for the Audit Council to decide, in spite of the strong suggestion contained in the 1981 opinion.

IV. Your next question asked that we comment on the impact of § 1-22-60 of the Compliance Review Act on § 2-15-120, as to confidentiality of various records. This question is addressed on page four (4) of the opinion dated September 26, 1990.

V. You have advised that while § 2-15-120 provides for a court determination as to whether records should be disclosed, § 1-22-60 does not contain a similar provision. You asked whether under § 1-22-60 there is not a mechanism for Audit Council records ever being disclosed to the public.

Section 1-22-60 declares that records pertaining to compliance reviews except for Preliminary and Final Compliance Review Reports are confidential and must not be disclosed to the public. If, however, a court were asked to rule on disclosure of such records in an appropriate proceeding, a court conceivably could order the disclosure of a given record. In so doing, a court would most certainly attempt to protect the confidentiality insofar as possible while simultaneously balancing the need for disclosure.

Some courts faced with such an issue have ruled that statutes conferring confidential status on records such as these did not grant an absolute privilege against disclosure. Hanson v. Rowe, 18 Ariz. App. 131, 500 P.2d 916 (1972). Such statutes might not preclude mandatory disclosure when such is required by a court, Maine Sugar Industries, Inc. v. Maine Industrial Building Authority, 264 A.2d 1 (Me. 1970); rather, such statutes are intended to prevent voluntary disclosure. Id.; and Pooler v. Maine Coal Products, 532 A.2d 1026 (Me. 1987).

Some of the considerations of courts in determining whether to compel disclosure or production of confidential documents include: determining whether the injury to the confidential relationship that would be caused by the disclosure would be outweighed by the benefit to be gained by completely litigating a matter; whether the requested documents are pertinent to a legal inquiry; and whether there is potential for misuse of the claimed governmental privilege. Wigmore, a noted authority on evidence, suggests four tests to be applied in construing confidentiality provisions of statutes which tests are often cited by the courts in this circumstance:

1. The communications must originate in confidence that they will not be disclosed.

> 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> 3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> 4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. [Emphasis in original.]

Maine Sugar Industries, Inc. v. Maine Industrial Building Authority, supra, 264 A.2d 6; also in Hanson v. Rowe, supra, and In Re Hampers, 651 F.2d 19 (1st Cir. 1981).

Perhaps a court in South Carolina would apply these or similar balancing tests if production or disclosure of records made confidential by § 1-22-60 should be sought in an appropriate proceeding. A court faced with the issue could likely compel production or disclosure of records ordinarily considered confidential. Of course, such a determination could be made only on a case-by-case basis, taking into account all relevant facts and circumstances. See also Op. Atty. Gen. No. 85-125, dated October 28, 1985 (information made privileged under state law is nonetheless subject to disclosure by order of a federal court).

In the opinion of this Office dated June 24, 1981, was the following:

> In the event a subpoena duces tecum is served on the Audit Council prior to the publication of a final audit report, you should immediately contact this Office so that we may discuss the feasibility of entering a motion to quash the subpoena based on the position that a subpoena cannot require an act that would be criminal. If that motion were to be denied, the effect would be a court order that you disclose the information sought, and it is the opinion of this Office that that would sufficiently protect the person involved from being deemed in violation of §2-15-120.

We are still of the opinion that an order of the court as described therein would "sufficiently protect the person involved from being in violation of § 2-15-120." (Parenthetically, we note that subsequent to the issuance of the 1981 opinion, the Audit Council began

employing in-house legal counsel. Rather than the Audit Council now immediately contacting our Office if served with a subpoena duces tecum, such matters should be handled generally by the Audit Council's in-house legal counsel.)

VI. You have asked that this Office define "public disclosure" as it relates to §§ 1-22-60 and 2-15-120. Section 1-22-60 states that the records described therein "must not be disclosed to the public." Similarly, § 2-15-120 declares certain records to be "not subject to public disclosure prior to the publication of the final audit report."

In describing the cause of action of "publicizing of one's private affairs with which the public has no legitimate concern," the South Carolina Court of Appeals in Rycroft v. Gaddy, 281 S.C. 119, 314 S.E.2d 39 (S.C. App. 1984), stated that

> an essential element of recovery is a showing of a public disclosure of private facts. [Cite omitted.] The disclosure of private facts must be a public disclosure, and not a private one; there must be, in other words, publicity. [Cite omitted.] It is publicity, as opposed to publication, that gives rise to a cause of action for invasion of privacy. [Cites omitted.] Communication to a single individual or to a small group of people, absent a breach of contract, trust, or other confidential relationship, will not give rise to liability. [Emphasis in original.]

314 S.E.2d at 43. Publicity is thus a key element to "public disclosure."

Disclosure of ordinarily protected information by one governmental employee or department to another where such was necessary to the proper functioning of the city's officials or departments would not be deemed a "public disclosure." As stated in Parrott v. Rogers, 103 Cal. App. 3d 377, 163 Cal. Rptr. 75 (1980),

> We are advised of no law or other authority which precludes investigation or inquiry, into any aspect of the acts or records of a city's government, by a city official or employee otherwise authorized by law to do so for the purpose, as noted, of reporting or commenting to the city council or other department "upon the functioning of city government and recommending appropriate policies or changes in policy." Such a disclosure by one official or department to

> another is not a "public disclosure" as contended by defendants. In the exercise of his functions the citizens' assistant, like all other of the City's officials and employees, is subject to the provisions of any law forbidding public, or private disclosure of designated records or information to "citizens" ... or others.

163 Cal. Rptr. at 78.

In Willbanks v. Smith County, Tex., 661 F.Supp. 212 (E.D. Tex 1987), the court described the act of public disclosure as "to publish, that is, to make known to people generally." 661 F.Supp. at 217. The court continued that a defendant's divulgence of a stigmatizing charge against a plaintiff in a legal proceeding, by itself, would not constitute public disclosure. Clarifying the jury charge relative to "making known to people generally," the court stated:

> Publication of defamatory matter is its intentional communication to one other than the person defamed. It is not necessary that the defamatory matter be communicated to a large or even substantial group of persons. It is enough that it be communicated to a single individual other than the person defamed.

Id. Disclosure within the governmental agency employing the person alleged to have made the public (defamatory) disclosure would not be sufficient to constitute public disclosure; instead, such disclosure occurs when one discloses the information to persons outside the agency.

Analyzing these judicial decisions, it seems clear that sharing information within an agency or among various departments of a political subdivision, or disclosing information as a result of legal proceedings, would probably not amount to "public disclosure." Some publicity to one or more members of the public is necessary, though publication (as by the media) is not necessary, to establish the fact of "public disclosure."

It is difficult to provide more specific guidance on your legal question. These general principles would then be applied to a specific fact situation, to determine whether "public disclosure" had occurred, on a case-by-case basis.

VII. You have asked whether either of the confidentiality provisions (§§ 2-15-120 or 1-22-60) would prohibit the Audit Council from providing records from its files to law enforcement agencies such as SLED or the solicitor. In light of our opinions of September 21 and 26, 1990, we assume that you refer to a situation other than after a final report of a sunset review has been released.

In the opinion of June 24, 1981, we stated:

> The Audit Council can continue to provide factual information to the Office of the Attorney General of South Carolina and Solicitors' offices, State Law Enforcement Division, State Auditor's Office, State Budget and Control Board, State Comptroller General and the United States Department of Justice, Federal Bureau of Investigation, and the U.S. General Accounting Office, provided, however, that such disclosure should be made in total confidence and with the understanding by the agency to whom disclosure is made that subsequent public disclosure might be a violation of § 2-15-120 by that agency.

This opinion dealt with the provision of "factual information" by the Audit Council to the above agencies rather than "providing records" as you currently inquire. No privilege protects criminal activity; if the Audit Council should discover evidence of criminal activity, such should be reported to the appropriate law enforcement agency. Such reporting could be accomplished by transmitting the necessary information to that agency without necessarily disclosing the record or document which revealed the alleged criminal activity. In so doing, confidentiality statutes must be kept in mind; for example, though income tax records may be protected as confidential, perhaps general information could be revealed to the appropriate law enforcement officials to the effect that criminal activity with respect to the taxpayer is suspected. The law enforcement officials could then pursue the matter as they deem necessary

One additional comment is in order here, as well as in response to question VI as to public disclosure and other questions about confidentiality of records. The statutes providing for confidentiality of records are not meant to protect records which are ordinarily public records but which appear to become imbued with confidentiality merely because the records are in the files of the Audit Council. The information or record should be examined as to its status at its original source; if it is not confidential there, or if the law enforcement agency could locate the document, record, or information on its own initiative, a stronger case is presented for more expansive disclosure to law enforcement officials.

If any doubt exists as to whether to disclose, or the extent to disclose, particular information, documents, or records, guidance from the appropriate court could always be sought. See Op. Atty Gen. No. 85-125, dated October 28, 1985 (information made privileged under state law is nonetheless subject to disclosure by order of a federal court).

VIII. You have asked whether any distinction should be made between reporting to law enforcement during the course of an audit or after the final audit report has been published.

Referring to question VII above, if the audit is in process, evidence of criminal activity could be reported by transmitting the necessary information to the appropriate law enforcement officials. Once the sunset report has been published, we have previously opined that those records could be subject to disclosure unless otherwise protected by some provision of law; in that case, the Audit Council could provide records or documents with its reports of alleged criminal activities to law enforcement agencies or officials.

IX. You have asked whether any distinction should be made between reporting possible criminal acts and reporting possible illegal acts, understanding that the Audit Council would not necessarily always recognize the distinction.

We suggest that if the Audit Council suspects or has evidence that criminal or illegal acts are occurring or have occurred, such should be reported to the appropriate law enforcement officials, who could review the matters and make the necessary determinations. What to refer or whether to refer to law enforcement would be up to the Audit Council in a given situation; if it is not clear that criminal or illegal activity has occurred, the more prudent course would be to report the same to law enforcement officials for their evaluation, to permit them to make any appropriate distinctions.

X. Finally, you have asked whether written legal advice or legal analysis provided by Audit Council legal counsel, and relating to a specific audit, constitute a matter which is exempt from disclosure under § 30-4-40(a)(7) of the Freedom of Information Act. You advised that attorneys who have been employed as legal counsel to the Audit Council have been employed in a dual capacity as both legal counsel and auditor; you essentially wish to know whether a distinction is to be made in work done as an auditor and work performed as an attorney.

The Freedom of Information Act, § 30-4-10 et seq., recognizes the attorney-client privilege by providing in § 30-4-40:

> (a) The following matters are exempt from disclosure under the provisions of this chapter:
>
> ....
>
> (7) Correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.

In addition, an attorney employed by the Audit Council is also bound by the Rules of Professional Conduct, new Supreme Court Rule 32, which in Rule 1.6 governs confidentiality of information gained in the attorney-client relationship. Whether an attorney is momentarily participating in an audit or undertaking some other activity on behalf of the Audit Council, the attorney is still providing legal advice in one form or another; the attorney's work product is being generated or produced. Thus, generally speaking, there would be no distinction, though it might be necessary to examine a given file to make certain that specific documents were indeed entitled to exemption as the attorney's work product. See § 30-4-40(b).

We trust that the foregoing has satisfactorily responded to your inquiries. If clarification or additional assistance should be needed, please advise.

With kindest regards,

Sincerely,

Edwin E. Evans
Chief Deputy Attorney General

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook
Robert D. Cook
Executive Assistant for Opinions